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In the Supreme Court of the United States

OCTOBER TERM, 1998

CAROLE KOLSTAD, PETITIONER

v.

AMERICAN DENTAL ASSOCIATION

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

The Civil Rights Act of 1991, Pub. L. No. 102-166, § 102, 105 Stat. 1072, authorizes the award of punitive damages to a person who has been subjected to employment discrimination prohibited by Title VII of the Civil Rights Act of 1964, if the defendant is not a governmental entity, the discrimination was intentional, and it was engaged in "with malice or with reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. 1981a(b)(1). The question presented is:

Whether a showing of "egregious" discriminatory conduct is necessary for an award of punitive damages under 42 U.S.C. 1981a(b)(1).

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INTEREST OF THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

This case concerns the standard for submitting a claim of punitive damages to a jury under 42 U.S.C. 1981a(b)(1), which authorizes the award of punitive damages against private employers in certain cases arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and Title I of the Americans With Disabilities Act, 42 U.S.C. 12101 *et seq.* See 42 U.S.C. 1981a(a) and (b)(1). The Equal Employment Opportunity Commission (EEOC) has authority to enforce both statutes against private employers and to seek punitive damages. 42 U.S.C. 1981a(b)(1) and (d)(1), 2000e-5(a) and (f), 12117(a). The EEOC participated as *amicus curiae* in this case in the court of appeals. In addition, the Fair Housing Act has been interpreted as

incorporating a standard for punitive damages that is similar to the Section 1981a standard at issue in this case. The Attorney General is responsible for enforcing the Fair Housing Act, see 42 U.S.C. 3612(o)(3), 3613(c)(1), 3614(d)(1)(B). The Court's decision in this case thus is likely to affect the enforcement responsibilities of the EEOC and the Attorney General.

STATEMENT

1. Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* (Title VII), prohibits employers from discriminating in employment decisions on the basis of race, color, religion, sex, or national origin. 42 U.S.C. 2000e-2(a), 2000e(b) and (f). As originally enacted, Title VII afforded prevailing plaintiffs only equitable remedies, such as back pay and reinstatement. 42 U.S.C. 2000e-5(g)(1); see also *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 252-253 (1994). Compensatory and punitive damages were available under 42 U.S.C. 1981 to some victims of racial discrimination in employment, see *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 459-460 (1975), but not to victims of discrimination based on sex or religion.

Section 102 of the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1072 (1991 Act), significantly expanded the remedies available under Title VII to victims of unlawful discrimination that is intentional, rather than unlawful because of disparate impact. The 1991 Act created a new Section 1981a, which provides that victims of unlawful intentional discrimination under Title VII, as well as some victims of discrimination prohibited by Title I of the Americans With Disabilities Act of 1990, 42 U.S.C. 12101 *et seq.* (Disabilities Act), can recover compensatory damages for "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses." 42 U.S.C. 1981a(b)(3). Section 1981a further authorizes the award of punitive damages

under Title VII and the Disabilities Act in certain circumstances:

> A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

42 U.S.C. 1981a(b)(1).[1] Section 1981a limits the total amount of compensatory and punitive damages for which an employer can be held liable by imposing caps, which depend upon an employer's size, ranging from $50,000 to $300,000. 42 U.S.C. 1981a(b)(3).

2. Petitioner Carole Kolstad sued her employer, respondent American Dental Association, for sex discrimination under Title VII. In the fall of 1992, petitioner, who was respondent's Director of Federal Agency Relations, applied for the newly vacant position of Director of Legislation and Legislative Policy and Director of the Council on Government Affairs and Federal Dental Services. Pet. App. 3a. Petitioner was denied the promotion, which instead went to Tom Spangler, respondent's Legislative Counsel. *Id.* at 44a.

Petitioner filed suit under Title VII, alleging that respondent denied her promotion to the higher-ranking position because of her sex. Pet. App. 4a. The case was tried before a jury. *Id.* at 45a. At the close of evidence, the

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[1] Section 1981a precludes an award of compensatory or punitive damages under the reasonable accommodation provision of the Disabilities Act, 42 U.S.C. 12112(b)(5), where the employer "demonstrates good faith efforts, in consultation with the person with the disability * * *, to identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity and would not cause an undue hardship on the operation of the business." 42 U.S.C. 1981a(a)(3).

district court dismissed petitioner's claims for compensatory and punitive damages. *Ibid.* The jury returned a verdict in favor of petitioner, finding that respondent had unlawfully discriminated against petitioner on the basis of sex, and awarding $52,718 in back pay. *Ibid.*; J.A. 109-110.

3. Both petitioner and respondent appealed. The court of appeals unanimously rejected respondent's challenge to the liability determination, and reversed and remanded for reconsideration the denial of injunctive relief and attorneys' fees. Pet. App. 46a-49a, 54a-56a, 68a. A divided panel reversed the refusal to submit the punitive damages claim to the jury. *Id.* at 49a-54a, 57a-68a.

The court of appeals granted rehearing *en banc* limited to the punitive damages question. In a six-to-five decision, the court of appeals affirmed the district court. Pet. App. 1a-41a. The court ruled that Section 1981a permits a jury to consider punitive damages only in cases of "particularly egregious violations of Title VII," *id.* at 6a, and it found no such egregiousness in this case, *id.* at 12a. The court acknowledged that the additional requirement it was imposing for the award of punitive damages was not set forth in the statute itself. *Id.* at 5a, 6a. The court concluded nevertheless that a literal reading of Section 1981a "would conflict with the remedial structure of the statute [and] with legislative history." *Id.* at 6a. Judge Randolph concurred separately, stressing that the issue of statutory interpretation raised by the case was "exceedingly close." *Id.* at 23a.

Judge Tatel, joined by four other judges, dissented. The dissent noted that Section 1981a "never mentions egregiousness." Pet. App. 24a. Rather, Section 1981a's "reckless indifference" standard "makes the difference between compensatory and punitive damages depend on the employer's awareness of Title VII's legal mandates." *Id.* at 26a (internal quotation marks omitted). The dissent noted that "employers found to have intentionally discriminated in violation

of Title VII" may still be able "to convince a judge to remove the question of punitive damages from jury consideration altogether," if, for example, they relied upon the bona fide occupational qualification defense erroneously but not recklessly, or overreached in a good-faith effort to remedy the effects of past discrimination. *Id.* at 29a. Furthermore, application of the statutory standard does not mean that "juries will automatically award punitive damages in every Title VII disparate treatment case," because a jury, in the exercise of its "discretionary moral judgment," may decide not to award punitive damages even upon proof of an intentional violation of the statute. *Id.* at 28a.

SUMMARY OF ARGUMENT

A. The plain language of Section 1981a authorizes punitive damages when, in addition to engaging in intentional discrimination under Title VII or the Disabilities Act, the defendant did so "with malice or with reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. 1981a(b)(1). Congress thus established a standard for punitive damages that adds to the underlying liability standard a requirement that focuses on the employer's disregard of governing legal obligations. The plaintiff must show that the defendant either acted maliciously—that is, with an evil motive or the purpose of injuring—or disregarded a substantial risk that its conduct would violate the plaintiff's legal rights.

Nothing in the text of Section 1981a requires the plaintiff, in addition, to show that the underlying discriminatory conduct was egregious. The egregiousness of an employer's conduct may constitute evidence of an employer's malice or reckless indifference to an employee's rights. But other sources of evidence may be equally probative of malice or reckless indifference; the court of appeals erred in making egregious conduct the sole path to a punitive damages award.

B. The legislative history of Section 1981a provides no basis for supplementing the punitive damages standard Congress enacted with an extra-statutory limitation. Instead, the legislative history shows that Congress made purposeful choices in structuring the punitive damages provision, reflecting a substantial compromise between the economic interests of employers and the interests of employees and the public generally in eliminating discrimination from the workplace. That history shows that Congress intended to protect employers, not through narrowing the standard for punitive damages liability, but rather by capping the damages ultimately available to the employee. Adopting an interpretation of Section 1981a that both curtails the availability of punitive damages and limits that liability with damage caps would upset Congress's delicate and hard-fought compromise.

C. Adherence to Section 1981a's language is consistent with the purposes underlying the 1991 Act. First, a primary objective of the legislation was to deter discriminatory practices from occurring in the first place. The availability of punitive damages in cases of unlawful intentional discrimination advances that goal. Congressional frustration with the perpetuation of unlawful intentional discrimination nearly thirty years after the passage of Title VII reinforced the judgment that employers should face the threat of punitive damages whenever they act with malice or with reckless indifference to Title VII's prohibitions. In other words, through Section 1981a(b)(1), Congress determined that all unlawful intentional discrimination undertaken with malice or reckless indifference to federal law is inherently deserving of punishment through an award of punitive damages. The court of appeals was not free to reconsider that judgment.

Second, Title VII advances both private and public interests in a workplace free of discrimination. Title VII plaintiffs serve, in part, as private attorneys general vindi-

cating the federal interest in abolishing employment discrimination on the basis of race, gender, religion, and national origin. The standard Congress established for punitive damages in Section 1981a thus reflects that intentional discrimination, when undertaken with malice or reckless indifference to established prohibitions, causes both individualized and public injury and thus merits a commensurately broad remedial response.

ARGUMENT

SECTION 1981a(b)(1) AUTHORIZES PUNITIVE DAMAGES IN CASES OF UNLAWFUL INTENTIONAL DISCRIMINATION WHENEVER A PLAINTIFF DEMONSTRATES THAT THE DEFENDANT ACTED WITH MALICE OR RECKLESS INDIFFERENCE TO THE PLAINTIFF'S FEDERALLY PROTECTED RIGHTS

A. The Text Of Section 1981a Makes The Availability Of Punitive Damages Turn Upon The Employer's Malice Or Reckless Indifference To Federal Rights

1. The task of discerning the governing standard for an award of punitive damages under Section 1981a "begins where all such inquiries must begin: with the language of the statute itself." *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989). In this case, that is also where the inquiry ends, for Congress has spoken directly to the matter in the text of Section 1981a. Congress provided that, in cases of intentional discrimination prohibited by Title VII and the Disabilities Act, or a failure reasonably to accommodate under the Disabilities Act, a complaining party may recover punitive damages from a nongovernmental employer whenever she demonstrates that the employer engaged in the discrimination "with malice or with reckless indifference to [her] federally protected rights." 42 U.S.C. 1981a(b)(1).[2]

[2] Title VII and the Disabilities Act apply not just to employers, but also to other entities involved in the employment process such as employ-

The text of Section 1981a thus makes the availability of punitive damages turn upon the employer's malice or recklessness concerning its legal obligations at the time it engaged in the discriminatory conduct. If the employer undertakes its discriminatory acts maliciously (that is, with an evil motive or with the purpose of injuring the plaintiff),[3] or acts in disregard of a substantial risk that its conduct is unlawful,[4] then punitive damages are available.

The punitive damages standard Congress enacted adds an important element to the underlying liability standards for Title VII and the Disabilities Act. Liability for equitable relief under those statutes does not require intent. Liability for compensatory damages generally requires intent to discriminate (an employment practice with a disparate impact will not suffice, 42 U.S.C. 1981a(a)); the employer's malice or recklessness regarding its legal obligations, however, is neither a prerequisite to nor a necessary component of the

ment agencies and labor unions. See 42 U.S.C. 2000e-2(a)-(c), 12111(2), 12112(a). Throughout this brief, "employer" refers collectively to all covered entities under both statutes.

[3] See, *e.g.*, *Smith* v. *Wade*, 461 U.S. 30, 48, 56 (1983) (malice entails "an actual intent to injure" or "evil motive"); *id.* at 39 n.8 (noting varying meanings of malice, which include both subjective and objective significations); *Tinker* v. *Colwell*, 193 U.S. 473, 486 (1904) (malice "means a depraved inclination on the part of a person to disregard the rights of others").

[4] See *Hazen Paper Co.* v. *Biggins*, 507 U.S. 604, 617 (1993) (employer acts with reckless disregard if it "more likely knows its conduct to be illegal"); see generally *Farmer* v. *Brennan*, 511 U.S. 825, 836-837 (1994) ("The civil law generally calls a person reckless who acts or * * * fails to act in the face of an unjustifiably high risk of harm that is either known or so obvious that it should be known.") (citations omitted). The phrases "reckless indifference" and "reckless disregard" are commonly used interchangeably, and nothing indicates that Congress intended otherwise here. See, *e.g.*, *Black's Law Dictionary* 1270 (6th ed. 1990); *Farmer*, 511 U.S. at 836; *Smith*, 461 U.S. at 37, 38 n.6, 48, 51, 56; Restatement (Second) of Torts § 500 cmt. a (1965).

plaintiff's burden of proof. See generally *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973). Only for punitive damages does the employer's malice or disregard of its legal obligations become relevant. Accordingly, as both the majority and the dissent below recognized (Pet. App. 5a-6a, 25a-26a), a finding of intentional discrimination, without more, does not automatically make a plaintiff eligible to receive punitive damages. She must separately prove that the discriminatory conduct was undertaken by the employer either with malice or with reckless indifference to its legal obligation to avoid discrimination.[5]

2. The egregiousness standard adopted by the court of appeals (Pet. App. 12a) "has no statutory reference point." *Shannon* v. *United States*, 512 U.S. 573, 584 (1994). The word "egregious" is nowhere present in Section 1981a. Indeed, the focus of the court of appeals on the outrageous nature of the underlying discriminatory conduct is wholly inconsistent with the focus of Section 1981a(b)(1) on the employer's malice or recklessness regarding its legal obligations.

Moreover, when Congress has chosen to condition liability on egregious behavior, it has done so expressly, both in civil rights legislation and elsewhere.[6] When a statutory term is

[5] See *Emmel* v. *Coca-Cola Bottling Co.*, 95 F.3d 627, 636 (7th Cir. 1996) (explaining difference between the liability and punitive damages standards); EEOC Compliance Manual, *Enforcement Guidance: Compensatory and Punitive Damages Available under § 102 of the Civil Rights Act of 1991* 52 (1992) (*Enforcement Guidance*) ("A finding of liability does not of itself entitle a plaintiff to an award of punitive damages."). While the plaintiff's burden of proof for punitive damages is thus distinct from its burden at the liability stage, the plaintiff will not always have to introduce additional evidence to obtain punitive damages. In many cases, the evidence that establishes liability will also establish malice or reckless indifference.

[6] See 42 U.S.C. 1997a(a) (authority of Attorney General to bring suit when a State or state officials subject institutionalized persons "to

absent in one statute, but explicit in others, "Congress' silence * * * speaks volumes." *United States* v. *Shabani*, 513 U.S. 10, 14 (1994).

3. The court of appeals thought the reckless indifference standard Congress enacted was too vague to determine the difference between liability and punitive damages, Pet. App. 6a, but the court was mistaken. First, the standard Congress enacted and its functional equivalents have been considered sufficiently concrete to govern punitive damages under 42 U.S.C. 1983, *Smith* v. *Wade*, 461 U.S. 30, 56 (1983), punitive damages under the First Amendment, *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 349 (1974), and, in the criminal context, the imposition by a jury of a death sentence, *Tison* v. *Arizona*, 481 U.S. 137, 158 (1987). Given that pedigree, the standard is surely also sufficiently lucid to permit jury imposition of a moderately capped punitive damages award. See *Smith*, 461 U.S. at 49 ("[W]e are not persuaded that a recklessness standard is too vague to be fair or useful.").

Second, the court of appeals' egregiousness standard is no clearer. Compare *County of Sacramento* v. *Lewis*, 118 S. Ct. 1708, 1717 n.8, 1718-1720 (1998) (equating "egregious" behavior with conduct that, rather than merely being recklessly indifferent, shocks the conscience), with *Tincher* v. *Wal-Mart Stores, Inc.*, 118 F.3d 1125, 1132-1134 (7th Cir. 1997) (equating "egregious[]" behavior with malice or reckless indifference). Indeed, the court of appeals failed even to define the term. Pet. App. 12a-13a.

Third, and in any event, the imprecision in the statutory language that the court of appeals perceived provides no warrant for judicially amending the statute. See *United States* v. *National Treasury Employees Union*, 513 U.S. 454, 479 (1995) (emphasizing the Court's "obligation to avoid judicial legislation").

4. The absence of an egregiousness standard in the text of Section 1981a does not mean that the shocking or appalling character of a defendant's discriminatory conduct must be deemed irrelevant to the punitive damages inquiry. The egregiousness of the discriminatory conduct provides evidence of a defendant's malice or reckless indifference to the plaintiff's federally protected rights.[7] The more blatant and outrageous the discrimination, the stronger the inference that the employer knew or should have been aware of the substantial risk that its behavior had crossed the line of legality.

But demonstrating egregiousness is only one of many available means of proving that the standard set by Congress for punitive damages liability has been satisfied. Other evidence may be equally probative. First, reckless indifference is more likely where the discrimination is blatant and the legal prohibition clear. Second, the employer's recklessness may be evidenced by expressions of hostility to or resentment of federal civil rights law. Third, efforts to conceal or doctor evidence regarding the employment decision, the use of sham selection procedures, and the

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egregious or flagrant conditions" that deprive those individuals of their rights under federal law); see also 42 U.S.C. 1396u-2(e)(2)(B)(i) (providing for State supervision of Medicaid managed care organization that engages in "continued egregious behavior"); 12 U.S.C. 1708(c)(3)(D) (authorizing withdrawal of mortgagee where violations of law have been "egregious or willful"); 19 U.S.C. 2242(b)(1)(A) (identification of countries by the United States Trade Representative that "have the most onerous or egregious acts, policies, or practices" that deny effective intellectual property rights protection).

[7] See *Enforcement Guidance*, *supra*, at 53 (egregiousness can be one of many relevant factors demonstrating malice or reckless indifference). As an administrative interpretation by the enforcing agency, the EEOC's construction of Section 1981a's punitive damages provision merits some deference. *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 431 (1975); see also *EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244, 256-258 (1991).

tailoring of job criteria can suggest an evasion of known legal requirements. Fourth, a pervasive or lengthy pattern of discriminatory behavior, retaliation against a complainant, or other inappropriate responses to complaints of discrimination may tend to show the employer's recklessness. Lastly, the sophistication of the employer and its prior experience with discrimination complaints may also be relevant.[8] The flaw in the court of appeals' reasoning was not that it permitted egregiousness to play a role in identifying what cases are eligible for punitive damages, but that the court made egregiousness the defining criterion for punitive damages, rather than simply one form of relevant evidence that may be used to satisfy Congress's standard.

B. The Structure Of Section 1981a Supports A Standard Of Liability For Punitive Damages That Focuses On The Employer's Malice Or Reckless Indifference To The Unlawfulness Of Its Conduct

1. The structure of Section 1981a also supports conditioning punitive damages liability on the employer's malice or reckless indifference to the wrongfulness of its conduct, rather than its egregiousness. See generally *Conroy* v. *Aniskoff*, 507 U.S. 511, 515 (1993) ("[A] statute is to be read as a whole, since the meaning of statutory language, plain or not, depends on context.") (internal quotation marks and citation omitted).

[8] See, *e.g.*, *Enforcement Guidance*, *supra*, at 53-54 (non-exclusive list of relevant factors); *EEOC* v. *Wal-Mart Stores, Inc.*, 156 F.3d 989, 992-993 (9th Cir. 1998); *Harris* v. *L & L Wings, Inc.*, 132 F.3d 978, 984 (4th Cir. 1997); *Williamson* v. *Handy Button Mach. Co.*, 817 F.2d 1290, 1296 (7th Cir. 1987); *Walters* v. *City of Atlanta*, 803 F.2d 1135, 1148 (11th Cir. 1986); *Stallworth* v. *Shuler*, 777 F.2d 1431, 1435 (11th Cir. 1985); *cf. TXO Prod. Corp.* v. *Alliance Resources Corp.*, 509 U.S. 443, 462-463 & n.28 (1993) (opinion of Stevens, J.) (factors relevant to punitive damages generally); *id.* at 468-469 (opinion of Kennedy, J.) (same).

Section 1981a separately provides for compensatory damages and punitive damages. The compensatory damages provision requires proof of intentional discrimination (or, in the case of some disability decisions, a failure to act reasonably and in good faith to accommodate a disability) and actual injury, 42 U.S.C. 1981a(a) and (b)(3). The punitive damages provision turns upon the employer's malice or reckless indifference to its legal obligations. As reflected in the structure of Section 1981a, Congress thus envisioned that the two forms of damages would entail different inquiries.

The court of appeals correctly perceived the intent to create a two-tiered structure, but mistakenly concluded that punitive damages should require a heightened version of the same facts necessary for compensatory damages—discriminatory intent and injury—instead of recognizing that an award of punitive damages requires something else altogether. The court of appeals thus reduced Congress's separately structured compensatory and punitive damage inquiries into two points along a single continuum.

2. The court of appeals found it appropriate to add a requirement of a "particularly egregious violation[]" (Pet. App. 6a) to the punitive damages statute in order to ensure a meaningful two-tiered liability scheme, in which not every finding of intentional discrimination automatically qualifies for punitive damages. *Id.* at 6a, 18a. But this Court has already rejected precisely that reasoning in construing an analogous provision of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. 626(b). That provision authorizes an award of liquidated (double) damages for "willful" violations of the ADEA. In *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111, 126 (1985), this Court held that liquidated damages under the ADEA are, like the punitive damages at issue here, intended "to be punitive in nature." *Id.* at 125. The Court further held that a violation of the ADEA is willful, warranting punitive damages, "if the

employer * * * knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." *Id.* at 126 (internal quotation marks omitted).

In *Hazen Paper Co.* v. *Biggins*, 507 U.S. 604 (1993), the Court rejected the invitation to find in the ADEA, in addition to the requirement of reckless disregard of the law, a further requirement of "outrageous" conduct. *Id.* at 615.[9] In that case, as here, the employer argued that the additional element was necessary to maintain a two-tiered system and ensure that not every violation of the ADEA qualified for liquidated damages. *Id.* at 614-616.

This Court unanimously rejected the suggestion that courts should impose extra-statutory conditions on punitive awards, for two reasons. First, the suggestion is inconsistent with the plain language of the statute:

> The ADEA does not provide for liquidated damages "where consistent with the principle of a two-tiered liability scheme." It provides for liquidated damages where the violation was "willful." That definition must be applied here * * *.

Hazen Paper, 507 U.S. at 616.

Second, the suggestion is unnecessary, because the statute establishes an adequately differentiated two-tiered system without judicial amendment. The Court noted that the ADEA "is not an unqualified prohibition on the use of age in employment decisions," *Hazen Paper*, 507 U.S. at 616, but rather affords a "bona fide occupational qualification defense" and exempts certain subject matters and persons, thus leaving ample opportunity for an employer to believe in

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[9] The requirement of "outrageous" conduct had been adopted by *Lockhart* v. *Westinghouse Credit Corp.*, 879 F.2d 43, 57-58 (3d Cir. 1989); other circuits had adopted different requirements. See, *e.g.*, *Neufeld* v. *Searle Labs.*, 884 F.2d 335, 340 (8th Cir. 1989) (evidence must be direct rather than circumstantial); *Spulak* v. *K Mart Corp.*, 894 F.2d 1150, 1159 (10th Cir. 1990) (age must be the "predominant" factor).

good faith and without recklessness that the statute permits a particular age-based decision. *Ibid.* Quite simply, "[i]t is not true that an employer who knowingly relies on age in reaching its decision invariably commits a knowing or reckless violation of the ADEA." *Ibid.* The difference between liability for compensatory relief under the statute and liability for liquidated double damages is a showing of "willfulness." Accordingly, "[o]nce a 'willful' violation has been shown, the employee need not additionally demonstrate that the employer's conduct was outrageous" to merit punitive liquidated damages under the ADEA. *Id.* at 617.

That same reasoning controls here. Congress did not authorize punitive damages under Section 1981a only "where consistent with the principle of a two-tiered liability scheme." *Hazen Paper*, 507 U.S. at 616. It authorized punitive damages whenever the employer engages in unlawful intentional discrimination "with malice or with reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. 1981a(b)(1).

Moreover, it simply is not true that, absent additional extra-statutory limitations, punitive damages will be available in all cases of unlawful intentional discrimination under Title VII or the Disabilities Act. They are available only where the employer engages in unlawful intentional discrimination (or an unlawful failure to accommodate) with malice or reckless indifference to the law. An employer may be liable for compensatory damages, but not punitive damages under Title VII when the employer relies on a prohibited characteristic believing mistakenly but in good faith that the trait is a bona fide occupational qualification, 42 U.S.C. 2000e-2(e); or that he is making a valid effort to remedy the effects of past discrimination; or that he is not obliged to accommodate a particular religious exercise because of "undue hardship," 42 U.S.C. 2000e(j); or that an individual falls within the "personal staff" exception to Title VII, 42 U.S.C. 2000e(f).

Similarly, under the Disabilities Act, an employer may be liable for equitable relief and compensatory damages, but not punitive damages, where he mistakenly but in good faith believes that (i) the employee is not a "qualified individual" for the position, 42 U.S.C. 12111(8); (ii) differential treatment of the individual with a disability is a "business necessity," 42 U.S.C. 12113(a); (iii) the employee would pose a "direct threat" to the health or safety of others, 42 U.S.C. 12113(b); (iv) the employee can be segregated from certain functions because he carries an infectious or communicable disease, 42 U.S.C. 12113(d); or (v) the employee has not been rehabilitated from his illegal use of drugs, 42 U.S.C. 12114, 12210.[10]

Under both Title VII and the Disabilities Act, liability judgments based on novel legal theories may also be ineligible for punitive damages if the employer would not have been on clear notice of the legal infirmity of its conduct. Further, the responsibility of an employer for punitive damages for co-worker harassment or non-tangible employment actions accomplished through attenuated agency relationships has not yet been settled.[11] Finally, punitive damages "are never awarded as of right"; an award always rests within the jury's "discretionary moral judgment." *Smith*, 461 U.S. at 52.

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[10] Section 1981a separately immunizes from compensatory and punitive damages good faith efforts by an employer, cooperating with the employee, to accommodate a disability. 42 U.S.C. 1981a(a)(3).

[11] Compare Pet. App. 30a ("Attribution of employee state of mind differs when the jury turns to the question of punitive damages."), and *Splunge* v. *Shoney's, Inc.*, 97 F.3d 488, 491 (11th Cir. 1996) (state of mind of harassing employee not imputed to the company for purposes of punitive damages), with *Deffenbaugh-Williams* v. *Wal-Mart Stores, Inc.*, 156 F.3d 581, 592-594 (5th Cir. 1998) (supervisor's malicious or recklessly indifferent acts imputed to employer for purposes of punitive damages); see generally *Faragher* v. *City of Boca Raton*, 118 S. Ct. 2275, 2290-2293 (1998); *Burlington Indus., Inc.* v. *Ellerth*, 118 S. Ct. 2257, 2270 (1998).

Through the text of Section 1981a, Congress has thus ensured that punitive damages are available—but not guaranteed—only in those cases that involve both unlawful intentional discrimination (or failure to accommodate) and also malice or reckless indifference to governing law. The court of appeals thought it implausible that Congress intended to exclude from punitive damages only cases involving a good faith mistake of law, leaving every "garden variety" disparate treatment case eligible for punitive damages. Pet. App. 18a. But in fact, Congress could reasonably conclude that in the absence of some reasonable belief in the lawfulness of the discriminatory conduct, all such acts of discrimination are sufficiently blameworthy and injurious as to be eligible for punitive damages. "After all, can it really be disputed that intentionally discriminating against a black man on the basis of his skin color," or a woman on the basis of her gender, "is worthy of some outrage?" *Rowlett* v. *Anheuser-Busch, Inc.*, 832 F.2d 194, 206 (1st Cir. 1987); see also *Smith*, 461 U.S. at 54 ("[S]ociety has an interest in deterring and punishing *all* intentional or reckless invasions of the rights of others.").

It is precisely because there are numerous areas of uncertainty at the margins of the anti-discrimination statutes that Congress found it necessary to distinguish between the standard for liability and the standard for punitive damages. The purpose of the additional criteria for punitive damages was not, as the court of appeals seemed to think, to limit punitive damages to a small number of defendants, but rather to limit punitive damages to those defendants who were sufficiently culpable—without regard to their number. Whether the punitive damages standard, in practice, embraces a few, many, or most intentional Title VII cases is entirely beside the point. This is a case of statutory construction, and it is Congress's judgment, as expressed in the statutory text, that must control. *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 578 (1979) ("The ultimate question

is one of congressional intent, not one of whether this Court thinks that it can improve upon the statutory scheme that Congress enacted into law.").

C. Analogous Civil Rights Legislation And General Tort Principles Support Permitting Punitive Damages Based On Malice Or Reckless Indifference To Federal Law, Without Any Additional Requirement Of Egregious Misconduct

1. The malice or reckless indifference standard for punitive damages, without an egregiousness requirement, is consistent with the governing standard for punitive damages under other civil rights laws.[12] As noted, liquidated damages under the ADEA are available when an employer "knows or recklessly disregards the illegality of its conduct," with no additional showing of "outrageous[ness]" required. *Hazen Paper*, 507 U.S. at 616, 617. Likewise, punitive damages are available in actions brought under 42 U.S.C. 1983 "when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." *Smith*, 461 U.S. at 56. That same standard has been held to govern actions under 42 U.S.C. 1981, 1982, and 1985, and the Fair Housing Act, 42 U.S.C. 3613(c)(1).[13]

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[12] A standard that focuses on the defendant's reckless indifference to its legal obligations, rather than the nature of the underlying conduct, is also consistent with numerous other federal statutes authorizing punitive damages. See, *e.g.*, 11 U.S.C. 363(n) ("willful disregard" of the law); 15 U.S.C. 78u(h)(7)(A)(iii) (where violation of law is "willful, intentional, and without good faith"); 18 U.S.C. 2724(b)(2) ("willful or reckless disregard of the law"); 42 U.S.C. 300aa-23(d) ("intentional" violations); 42 U.S.C. 14503(a)(3) ("conscious, flagrant indifference to" rights).

[13] See, *e.g.*, *Barbour* v. *Merrill*, 48 F.3d 1270, 1277 (D.C. Cir. 1995) (under Section 1981, *Smith* standard governs and "[n]o additional evidence is required."), cert. dismissed, 516 U.S. 1155 (1996); *Ragin* v. *Harry Macklowe Real Estate Co.*, 6 F.3d 898, 909 (2d Cir. 1993) (Fair Housing Act); *United States* v. *Balistrieri*, 981 F.2d 916, 936 (7th Cir. 1992) (Fair Housing Act), cert. denied, 510 U.S. 812 (1993); *Asbury* v. *Brougham*, 866 F.2d 1276, 1282 (10th Cir. 1989) (Section 1982); *Stephens* v. *South Atlantic Canners, Inc.*, 848 F.2d 484, 489-490, 492 & n.6 (4th Cir.) (Section 1981), cert. denied, 488 U.S. 996 (1988); *Rowlett*, 832 F.2d at 206 (rejecting additional "extraordinary" or "outrageous" criterion for punitive damages under Section 1981); *Handy Button Mach. Co.*, 817 F.2d at 1296 (Section 1981); *Walters*, 803 F.2d at 1147 (Section 1981); *Bell* v. *City of Milwaukee*, 746 F.2d 1205, 1266 (7th Cir. 1984) (applying *Smith* standard to action under 42 U.S.C. 1985); *Hobson* v. *Wilson*, 737 F.2d 1, 63 (D.C. Cir. 1984) (Section 1985), cert. denied, 470 U.S. 1084 (1985); see also *Fischl* v. *General Motors Acceptance Corp.*, 708 F.2d 143, 148 (5th Cir. 1983) ("reckless disregard" of law sufficient for punitive damages under the Equal Credit Opportunity Act, 15 U.S.C. 1691e(b)); *Anderson* v. *United Finance Co.*, 666 F.2d 1274, 1278 (9th Cir. 1982) (same); but see *Beauford* v. *Sisters of Mercy-Province of Detroit, Inc.*, 816 F.2d 1104, 1109 (6th Cir.) (requiring egregious conduct for an award of punitive damages under Section 1981), cert. denied, 484 U.S. 913 (1987).

Nothing in the text of Section 1981a warrants imposition of a stricter standard for punitive damages for Title VII or Disabilities Act violations than applies under those other civil rights laws. To the contrary, the fact that Congress specifically articulated a standard for punitive damages in Section 1981a, and did not rely on the courts to create a standard as it did with Sections 1981, 1983, and 1985, counsels strongly against judicial amendment of Congress's chosen terms.[14]

2. Congress's decision to focus liability for punitive damages on the employer's malice or reckless indifference to legal obligations, rather than the egregiousness of the underlying conduct, is also consistent with general principles of tort law. See generally *Shabani*, 513 U.S. at 12 (absent contrary indication, statutes are construed consistent with the common law). As this Court noted in *Smith*, *supra*, by

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[14] The legislative history confirms Congress's intent to harmonize the damages standards under federal civil rights laws. See H.R. Rep. No. 40, 102d Cong., 1st Sess., Pt. 1, at 64-65, 70, 74 (1991); H.R. Rep. No. 40, 102d Cong., 1st Sess., Pt. 2, at 24, 29 (1991).

the mid 1980s, "[m]ost cases under state common law * * * recogniz[e] that punitive damages in tort cases may be awarded not only for actual intent to injure or evil motive, but also for recklessness, serious indifference to or disregard for the rights of others." 461 U.S. at 47-48; see also *id.* at 48 n.13 (citing cases). Egregiousness is not required. Thus, the standard Congress enacted for punitive damages in Section 1981a, including its omission of an egregiousness requirement, comports with the governing common law at the time Section 1981a was enacted.

Congress's standard also echoes the punitive damages rule recognized by the Restatement of Torts, which provides that "[p]unitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others." Restatement (Second) of Torts § 908(2) (1979). According to the Restatement, the actor's evil motive or reckless disregard is precisely what renders his actions "outrageous" and thus "provide[s] the necessary state of mind to justify punitive damages." *Id.* at cmt. b.[15]

[15] Even if Congress's standard departed from the common law, that would not justify the court's creation out of whole cloth of additional limitations on punitive damages. The rule that statutes will be construed in accord with the common law applies only when Congress has not "otherwise instructed." *Molzof* v. *United States*, 502 U.S. 301, 307 (1992) (quoting *Morissette* v. *United States*, 342 U.S. 246, 263 (1952)). Congress's explicit articulation of the governing standard for punitive damages in Section 1981a would have to be considered a "contrary indication[]" signaling departure from the common law. *Shabani*, 513 U.S. at 13. Furthermore, this Court has recognized that "common-law principles may not be transferable in all their particulars to Title VII." *Faragher*, 118 S. Ct. at 2285 (quotation marks omitted).

D. The Legislative History Supports Permitting Punitive Damages Based On Malice Or Reckless Indifference, Without Any Additional Requirement Of Egregious Misconduct

1. Because Section 1981a's language is plain in establishing a governing standard for punitive damages, "the sole function of the courts is to enforce it according to its terms." *Ron Pair*, 489 U.S. at 241 (internal quotation marks omitted). Given the precision with which Congress has spoken, "reference to legislative history * * * is hardly necessary." *Ibid.* Snippets from the legislative history alone thus cannot justify the creation of an extra-statutory doctrine that finds no home in the text Congress enacted. See *Shannon*, 512 U.S. at 584.

In any event, the legislative history supports a straightforward application of the statutory text, without an egregiousness requirement. Indeed, the House Report notes the different focus of the liability and punitive damages inquiries:

> Plaintiffs must first prove intentional discrimination, * * * and must meet an even higher standard (establishing that the employer acted with malice or reckless or callous indifference to their rights) to recover punitive damages.

H.R. Rep. No. 40, 102d Cong., 1st Sess., Pt. 1, at 72 (1991). Egregiousness is not included in the description of this standard. The Report reiterated this standard a few pages later, and noted that the statute set the same standard that courts have applied under Section 1981. *Id.* at 74 (citing *Rowlett*, *supra*, and *Smith*, *supra*). That explicit reference to this Court's decision in *Smith* and the fact that the statutory text echoes *Smith*'s standard for punitive damages, which does not require egregiousness, augurs strongly in favor of applying the statutory text as written. See also

H.R. Rep. No. 40, *supra*, Pt. 1, at 112 (reiterating statutory standard without reference to egregiousness); H.R. Rep. No. 40, 102d Cong., 1st Sess., Pt. 2, at 29 (1991) (reiterating statutory standard and citing with approval *Smith* and *Stallworth* v. *Shuler*, 777 F.2d 1431, 1435 (11th Cir. 1985), neither of which required egregiousness).[16]

The minority views expressed in the House Report, moreover, warned of the potential breadth of the punitive damages provision as enacted. H.R. Rep. No. 40, *supra*, Pt. 1, at 143-144 n.14 ("[O]ne might ask when, if ever, a jury would find that proven intentional discrimination by an employer did not constitute the requisite level of abuse."). The legislative standard, however, was not altered in response to this complaint. Congress thus cannot be presumed to have been unaware of the frequency with which punitive damages claims might be presented to a jury.

Floor statements also indicate that Congress did not intend to import additional, unwritten limitations into the punitive damages provision. "Punitive damages are available * * * to the same extent and under the same standards that they are available to plaintiffs under 42 U.S.C. § 1981. No higher standard may be imposed." 137 Cong. Rec. 30,662 (1991) (Rep. Edwards).

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[16] In stating its intent to adopt the standard governing punitive damages under Section 1981, the House Report also cited to *Beauford* v. *Sisters of Mercy-Province of Detroit, Inc.*, *supra*. H.R. Rep. No. 40, *supra*, Pt. 1, at 74. That decision does seem to require egregiousness, although it did so without much analysis. *Beauford*, 816 F.2d at 1109. When considered against the backdrop of repeated iterations of the statutory standard and the reference to *Smith*, that isolated citation does not provide the type of compelling evidence of congressional intent necessary to cast doubt on the language Congress actually adopted. See *Hubbard* v. *United States*, 514 U.S. 695, 708 (1995) ("Courts should not rely on inconclusive statutory history as a basis for refusing to give effect to the plain language of an Act of Congress.").

Some statements in the House Report and from the floor do suggest that punitive damages will be awarded only in egregious cases.[17] The word "egregious," however, is commonly used as shorthand for "more culpable" conduct. Such usage would be perfectly consistent with the statutory text as enacted, if the references to "egregious" refer to the culpability that results from acting with malice or reckless disregard of another's rights. Indeed, the Restatement of Torts uses the word "outrageous" in precisely this manner. Restatement (Second) of Torts § 908(2); see also *Hernandez-Tirado* v. *Artau*, 874 F.2d 866, 869 (1st Cir. 1989) (same). Because the legislators did not clearly indicate an intent that egregiousness be applied by courts as an additional criterion external to the statutory text and, in fact, imply by their votes acceptance of the statutory language as enacted, the better reading of those legislative comments is simply that Members of Congress considered any conduct in violation of the statutory "malice or reckless indifference" standard to be, by definition, egregious.

In any event, to the extent some legislators had a different view, those comments are insufficient to overcome the plain statutory text and its supporting legislative history. See *Hubbard* v. *United States*, 514 U.S. 695, 703 (1995 ("[A] historical analysis normally provides less guidance to a statute's meaning than its final text."). Indeed, as this Court recognized in *Landgraf* v. *USI Film Prods.*, 511 U.S. 244 (1994), the legislative history of the 1991 Civil Rights Act can be uniquely unhelpful in construing the Act's terms because it is loaded with "frankly partisan statements" that "cannot plausibly be read as reflecting any general agreement." *Id.* at 262; see also *id.* at 263 n.15 (" '[A] court would be well advised to take with a large grain of salt floor

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[17] See, *e.g.*, H.R. Rep. No. 40, *supra*, Pt. 1, at 65, 91; H.R. Rep. No. 40, *supra*, Pt. 2, at 3; 137 Cong. Rec. 30,661 (1991) (Rep. Edwards); *id.* at 30,678 (Rep. Hyde); *id.* at 29,035 (Sen. Dole); *id.* at 29,046 (Sen. Danforth).

debate and statements placed in the CONGRESSIONAL RECORD which purport to create an interpretation for the legislation that is before us.'" (quoting 137 Cong. Rec. 28,856 (1991) (Sen. Danforth)).[18]

2. The 1991 Civil Rights Act reflected extensive compromise and negotiation on the part of Congress and the White House. One area of contention, in particular, concerned the proper balance to be struck between the need to award punitive damages for deterrence purposes and the desire to protect small businesses from runaway jury awards. As the legislation left the House, it contained no cap on damages.[19] Damages caps were later added as a compromise to obtain the necessary support for the bill. See, *e.g.*, 137 Cong. Rec. 30,667 (1991) (Rep. Fish) ("The bill before us incorporates a cap on damages that seeks to accommodate employer concerns at the same time that we protect the civil rights of our work force.").[20]

The final legislation thus contained a delicate compromise that imposed caps on damages awards as a means of protecting businesses, while authorizing the award of punitive

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[18] See also 137 Cong. Rec. 30,683 (1991) (Rep. Ford) (in response to Rep. Hyde's legislative history remarks concerning, among other things, damages, Rep. Ford, "one of the authors of the bill," "categorically den[ies] [Rep. Hyde] was right on any one of his interpretations").

[19] See H.R. Rep. No. 40, *supra*, Pt. 1, at 125, 143 (objecting that the amendments to the damages provisions, which did not include a cap, would transform Title VII into "a litigation generating machine which will only benefit lawyers") (minority views); H.R. Rep. No. 40, *supra*, Pt. 2, at 52 n.2, 74.

[20] See also 137 Cong. Rec. 30,670 (1991) (Rep. Goodling) ("With respect to the litigation lottery that many feared would be the result of H.R. 1, the compromise takes several steps in the right direction. * * * The possibility of unlimited damages no longer serves as a carrot for filing a lawsuit under this compromise."); *id.* at 29,041-29,042 (Sen. Bumpers) (caps address business concerns about extent of liability); *id.* at 29,034 (Sen. Dole) ("With these caps, the incentive for frivolous lawsuits should be significantly reduced.").

damages in certain intentional discrimination cases to promote the goals of deterrence. See H.R. Rep. No. 40, *supra*, Pt. 1, at 18 (legislation "strengthen[ed] existing remedies to provide more effective deterrence"). The court of appeals' imposition of a new limitation that curtails the availability of punitive damages upsets that carefully calibrated balance. The court's interpretation offers businesses protection at both the onset of the damages stage, by foreclosing many awards of punitive damages, and at the conclusion of the process by significantly capping the damages ultimately recoverable by plaintiffs.

However, nothing in the legislative history suggests that Congress intended to provide two separate protections for employers in a bill designed largely to strengthen employee rights, increase employee compensation, and aggressively deter employer violations. To the contrary, Congress was frustrated that discrimination continued even though "[v]irtually everyone in America now understands that it is both 'wrong' and 'illegal' to discriminate intentionally." H.R. Rep. No. 40, *supra*, Pt. 1, at 14. Congress thus determined "to send a clear signal" that

> Congress is serious about halting job discrimination and one way to do that is to impose penalties that will make employers think twice about the financial consequences of violating the law. If employers will not do the right thing for its own sake, maybe they'll do it for the sake of their pocketbooks.

137 Cong. Rec. E3811 (daily ed. Nov. 7, 1991) (Rep. Collins); see also 137 Cong. Rec. 29,043-29,044 (1991) (Sen. Hatfield) ("[I]t is no less incumbent upon us to ensure that the laws of the United States offer no comfort to those who engage in discriminatory practices."); H.R. Rep. No. 40, *supra*, Pt. 1, at 64-65. Given the lengthy and hard-fought legislative battles that underlay the 1991 Civil Rights Act, this Court should be especially loath to adopt extra-statutory terms that sub-

stantially alter the compromises reflected in the statutory text that Congress enacted and the President signed.

E. The Purposes Of The 1991 Act Support Permitting Punitive Damages Based On Malice Or Reckless Indifference Without Any Additional Requirement Of Egregious Misconduct

1. Interpreting Section 1981a to permit punitive damages in all cases of intentional discrimination that is undertaken with malice or reckless indifference to the employer's legal obligations is consistent with the animating purposes of the 1991 Civil Rights Act. Congress was frustrated with "a history of noncompliance with known statutory requirements" by employers nearly thirty years after the passage of Title VII. *BMW of North Am., Inc.* v. *Gore*, 517 U.S. 559, 585 (1996).[21] Consequently, a primary goal of the legislation was to provide "strong medicine" in the form of compensatory and punitive damages "to cure the defendant's disrespect for the law," *BMW*, 517 U.S. at 577, and to deter employers from violating Title VII and the Disabilities Act in the first instance.[22]

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[21] See, *e.g.*, H.R. Rep. No. 40, *supra*, Pt. 1, at 14 ("In the twenty-seven years since Title VII of the Civil Rights Act of 1964 was enacted, many employers have accepted its mandate that discrimination on the basis of race, gender, national origin, or religion has no place in employment decisions. Those who have not accepted that principle should no[w] be subjected to a damage remedy when they intentionally discriminate.").

[22] See, *e.g.*, H.R. Rep. No. 40, *supra*, Pt. 1, at 18 ("Section 2 of the legislation also sets forth Congress's dual purposes: to respond to the Court's recent decisions by restoring the civil rights protections * * * and to strengthen existing remedies to provide more effective deterrence and ensure compensation commensurate with the harms suffered by victims of intentional discrimination."); *id.* at 69-70 ("Allowing full compensatory and punitive damages . . . would provide a stronger incentive for employers to implement effective remedies for intervention and prevention, which I think is the real goal. Data suggests that employers do indeed implement measures to interrupt and prevent

The broad availability of punitive damages in cases of intentional and maliciously or recklessly undertaken discrimination was a key component of that deterrence scheme. See, *e.g.*, 137 Cong. Rec. 30,661 (1991) (Rep. Edwards) ("Punitive damages serve the important purposes of * * * reinforcing the public policy against discrimination and adding to the deterrent value of a damages award."); *id.* at 28,915 (Sen. Jeffords) ("Punitive damages are intended to punish discriminators and to deter further discrimination."); *Landgraf*, 511 U.S. at 283 n.35 ("The new damages provisions of § 102 can be expected to give managers an added incentive to take preventive measures to ward off discriminatory conduct by subordinates *before* it occurs."). Indeed, punitive damages traditionally have served such a deterrence function.[23]

The court of appeals' whittling down of the class of employers subject to punitive damages frustrates Congress's goal of deterrence. Nothing in the legislative history suggests that Congress intended only to deter the most outlandish acts of intentional discrimination, while offering an economic cushion to those who flagrantly or recklessly violate the law in more subtle and less dramatic forms. Rather, the legislative history is replete with evidence that Congress's patience had run out across the board with those who persist in intentional discrimination in the face of well-established federal prohibitions.

2. Furthermore, the court of appeals' desire (Pet. App. 16a-19a) to limit dramatically the availability of punitive

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employment discrimination when they perceive that there is increased liability.") (quoting hearing testimony of Dr. Freada Klein).

[23] See, *e.g.*, *Pacific Mutual Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 15 (1991) (under common law, one key purpose of punitive damages is to "deter similar wrongful conduct"); *International Bhd. of Elec. Workers* v. *Foust*, 442 U.S. 42, 48 (1979) (punitive damages "are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence"); *Gertz*, 418 U.S. at 350 (same).

damages overlooks the unique character of Title VII and Disabilities Act litigation. Title VII and the Disabilities Act are "but part of a wider statutory scheme to protect employees in the workplace nationwide" and are critical components "of an ongoing congressional effort to eradicate discrimination in the workplace." *McKennon* v. *Nashville Banner Pub. Co.*, 513 U.S. 352, 357 (1995).

Accordingly, as this Court has repeatedly recognized, a private litigant enforcing federal civil rights legislation "not only redresses his own injury but also vindicates the important congressional policy against discriminatory employment practices." *McKennon*, 513 U.S. at 358; see also *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 45 (1974) (same). Because Title VII and Disabilities Act litigants "serve important national policies," *McKennon*, 513 U.S. at 360, they do not appear in court as ordinary, self-interested tort plaintiffs. Rather, they appear as private attorneys general giving effect to our "societ[y's] condemnation of invidious bias in employment decisions," *id.* at 357, whenever "even a single employee establishes that an employer has discriminated against him or her," *id.* at 358. Title VII and Disabilities Act suits are thus "private in form only." *Newman* v. *Piggie Park Enters.*, 390 U.S. 400, 401 (1968) (per curiam).[24]

The 1991 Civil Rights Act reconfirmed the special status of civil rights plaintiffs. The House Report explained that monetary damages are "also necessary to encourage citizens to act as private attorneys general to enforce the statute." H.R. Rep. No. 40, *supra*, Pt. 1, at 65. Further,

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[24] See also *Independent Fed. of Flight Attendants* v. *Zipes*, 491 U.S. 754, 759 (1989) (Title VII plaintiffs "act as private attorney[s] general, vindicating a policy that Congress considered of the highest priority"); *EEOC* v. *Associated Dry Goods Corp.*, 449 U.S. 590, 602 (1981) ("Congress considered the charging party a private attorney general, whose role in enforcing the ban on discrimination is parallel to that of the [EEOC] itself.") (internal quotation marks omitted).

> [t]he individual Title VII litigant acts as a "private attorney general" to vindicate the precious rights secured by that statute. It is in the interest of American society as a whole to assure that equality of opportunity in the workplace is not polluted by unlawful discrimination. Even the smallest victory advances that interest.

Id. at 47 (quoting hearing testimony of Jane Lang); see also 137 Cong. Rec. 30,661 (1991) (Rep. Edwards) ("Monetary damages are also necessary to encourage citizens to act as private attorneys general to enforce the law.").

Because Title VII and Disabilities Act actions serve a unique societal and governmental function, it is not surprising that Congress would also consider such suits to be particularly appropriate vehicles for the vindication of public policy through punitive damages awards. Punitive damages, after all, are designed to advance social and policy goals through the medium of individual litigation. See *BMW*, 517 U.S. at 568; *Pacific Mutual Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 15-16 (1991). Congress's frustration at the perpetuation of discriminatory practices makes it especially understandable that Congress would want to ensure that punitive damages are available (although not necessarily awarded) in every suit exposing intentional discrimination undertaken heedless of federal prohibitions on such conduct. After all, "[t]here is no doubt that Congress considered reliance on gender or race in making employment decisions an evil in itself." *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 265 (1989) (O'Connor, J., concurring); see also *BMW*, 517 U.S. at 583 (courts "should accord substantial deference to legislative judgments concerning appropriate sanctions for the conduct at issue") (internal quotation marks omitted).

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded for reconsideration of the punitive damages issue in light of this Court's opinion.

Respectfully submitted.

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APPENDIX

42 U.S.C. § 1981a provides:

Damages in cases of intentional discrimination in employment.

(a) Right of recovery

(1) Civil rights

In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 [42 U.S.C. 2000e-5, 2000e-16] against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act [42 U.S.C. 2000e-2, 2000e-3, 2000e-16], and provided that the complaining party cannot recover under section 1981 of this title, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

(2) Disability

In an action brought by a complaining party under the powers, remedies, and procedures set forth in section 706 or 717 of the Civil Rights Act of 1964 [42 U.S.C. 2000e-5, 2000e-16] (as provided in section 107(a) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12117(a)), and section 794a(a)(1) of title 29, respectively) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) under section 791 of title 29 and the regulations implementing section 791 of title 29, or who violated the requirements of section 791 of title 29 or the regulations implementing section 791 of title 29 concerning the provision of a reasonable accommodation, or section 102 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12112), or

committed a violation of section 102(b)(5) of the Act, against an individual, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

(3) Reasonable accommodation and good faith effort

In cases where a discriminatory practice involves the provision of a reasonable accommodation pursuant to section 102(b)(5) of the Americans with Disabilities Act of 1990 [42 U.S.C. 12112(b)(5)] or regulations implementing section 791 of title 29, damages may not be awarded under this section where the covered entity demonstrates good faith efforts, in consultation with the person with the disability who has informed the covered entity that accommodation is needed, to identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity and would not cause an undue hardship on the operation of the business.

(b) Compensatory and punitive damages

(1) Determination of punitive damages

A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

(2) Exclusions from compensatory damages

Compensatory damages awarded under this section shall not include backpay, interest on backpay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964 [42 U.S.C. 2000e-5(g)].

(3) Limitations

The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party–

(A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $50,000;

(B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $100,000; and

(C) in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $200,000; and

(D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding year, $300,000.

(4) Construction

Nothing in this section shall be construed to limit the scope, or the relief available under, section 1981 of this title.

(c) Jury trial

If a complaining party seeks compensatory or punitive damages under this section–

(1) any party may demand a trial by jury; and

(2) the court shall not inform the jury of the limitations described in subsection (b)(3) of this section.

(d) Definitions

As used in this section:

(1) Complaining party

The term "complaining party" means–

(A) in the case of a person seeking to bring an action under subsection (a)(1) of this section, the Equal Employment Opportunity Commission, the Attorney General, or a person who may bring an action or proceeding under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.); or

(B) in the case of a person seeking to bring an action under subsection (a)(2) of this section, the Equal Employment Opportunity Commission, the Attorney General, a person who may bring an action or proceeding under section 794a(a)(1) of title 29, or a person who may bring an action or proceeding under title I of the Americans with Disabilities Act of 1990 [42 U.S.C. 12111 et seq.].

(2) Discriminatory practice

The term "discriminatory practice" means the discrimination described in paragraph (1), or the discrimination or the violation described in paragraph (2), of subsection (a) of this section.

Excerpts from Title VII of the Civil Rights Act of 1964

42 U.S.C. § 2000e-2 provides in part:

Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer-

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

* * * * *

(e) Businesses or enterprises with personnel qualified on basis of religion, sex, or national origin; educational institutions with personnel of particular religion

Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or

national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

Excerpts from Title I of the Americans with Disabilities Act

42 U.S.C. § 12111 provides in part:

Definitions

* * * * *

(2) Covered entity

The term "covered entity" means an employer, employment agency, labor organization, or joint labor-management committee.

* * * * *

(4) Employee

The term "employee" means an individual employed by an employer. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

(5) Employer

(A) In general

The term "employer" means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, for two years following the effective date of this subchapter, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person.

(B) Exceptions

The term "employer" does not include—

(i) the United States, a corporation wholly owned by the government of the United States, or an Indian tribe; or

(ii) a bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of title 26.

* * * * *

(8) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

(9) Reasonable accommodation

The term "reasonable accommodation" may include—

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

(10) Undue hardship

(A) In general

The term "undue hardship" means an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B).

(B) Factors to be considered

In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include—

(i) the nature and cost of the accommodation needed under this chapter;

(ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;

(iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and

(iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

42 U.S.C. § 12112 provides in part:

Discrimination

(a) General rule

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) Construction

As used in subsection (a) of this section, the term "discriminate" includes—

(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;

(2) participating in a contractual or other arrangement or relationship that has the effect of subj[illegible]ting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the

covered entity, or an organization providing training and apprenticeship programs);

(3) utilizing standards, criteria, or methods of administration—

(A) that have the effect of discrimination on the basis of disability; or

(B) that perpetuate the discrimination of others who are subject to common administrative control;

(4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;

(5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

(6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is

shown to be job-related for the position in question and is consistent with business necessity; and

(7) failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

* * * * *

42 U.S.C. § 12113 provides:

Defenses

(a) In general

It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter.

(b) Qualification standards

The term "qualification standards" may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.

(c) Religious entities

(1) In general

This subchapter shall not prohibit a religious corporation, association, educational institution, or society from giving preference in employment to individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

(2) Religious tenets requirement

Under this subchapter, a religious organization may require that all applicants and employees conform to the religious tenets of such organization.

(d) List of infectious and communicable diseases

(1) In general

The Secretary of Health and Human Services, not later than 6 months after July 26, 1990, shall—

(A) review all infectious and communicable diseases which may be transmitted through handling the food supply;

(B) publish a list of infectious and communicable diseases which are transmitted through handling the food supply;

(C) publish the methods by which such diseases are transmitted; and

(D) widely disseminate such information regarding the list of diseases and their modes of transmissability[1] to the general public.

Such list shall be updated annually.

(2) Applications

In any case in which an individual has an infectious or communicable disease that is transmitted to others through the handling of food, that is included on the list developed by the Secretary of Health and Human Services under paragraph (1), and which cannot be eliminated by reasonable accommodation, a covered entity may refuse to assign or continue to assign such individual to a job involving food handling.

(3) Construction

Nothing in this chapter shall be construed to preempt, modify, or amend any State, county, or local law, ordinance, or regulation applicable to food handling which is designed to protect the public health from individuals who pose a significant risk to the health or safety of others, which cannot be eliminated by reasonable accommodation, pursuant to the list of infectious or communicable diseases and the modes of transmissability[1] published by the Secretary of Health and Human Services.

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[1] So in original. Probably should be "transmissibility."